LEE NYUK WAN @ JULIA

v.

CHIN OI JIN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J
[ORIGINATING SUMMONS NO. K. 64 OF 1989]
28 FEBRUARY 1995

FAMILY LAW: *Claim to pension of deceased by plaintiff and defendant as sole widow respectively - Plaintiff married to deceased under Roman Catholic rites - Deceased purported to have divorced plaintiff and married defendant - Certificate of Divorce granted by Native Court Tenom - Whether divorce valid.*

This was a claim for the pension of the deceased, a traffic controller with the Jabatan Keretapi Sabah, by the plaintiff and defendant who both alleged to be the sole widow of the deceased.

According to the plaintiff, she married the deceased on 19 August 1955 in accordance with Roman Catholic marriage rites at the Roman Catholic Church of St. Francis Xavier which was confirmed by the resident priest. She had six children with the deceased and did not have any knowledge that the deceased had obtained a divorce from her granted by the Native Court Tenom on 16 August 1965. The Certificate of Divorce was dated 14 December 1987. The defendant on the other hand, claimed to have lived with the deceased since 1962. On 10 March 1975, the defendant and the deceased apparently made a "Pengakuan" before the Native Court Membakut testifying to the fact that they had been cohabiting as husband and wife according to Murut custom and had two children and requested that their marriage be officially solemnised. A Certificate of Marriage was accordingly issued.

The issue to be decided was who was the rightful widow of the deceased.

Held:

[1] The plaintiff and the deceased have never been divorced as only the High Court can grant a divorce in the case of a Christian marriage. The Native Court Tenom realised its mistake in granting the divorce between the plaintiff and the deceased and on 28 March 1988 and 2 August 1993, wrote to the Pengurus Besar, Jabatan Keretapi Sabah and to Counsel for the plaintiff respectively confirming that the Certificate of Divorce issued to the deceased was null and void.

[2] The plaintiff's and the deceased's marriage being a monogamous marriage in accordance with the Roman Catholic marriage rites and the plaintiff and the deceased never having been divorced nor the marriage dissolved, the defendant did not have the legal capacity to be a party to the purported "Pengakuan". The "Surat Keterangan Nikah" from the Native Court Membakut was accordingly null and void.

[Plaintiff's application granted].

Case referred to:
Kupok binte Limpangon v. Kondilong binte Lantayan [1967] ***(foll)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976

For the plaintiff - Maijol Mahap
For the defendant - Ronny Cham

JUDGMENT

Suleiman Hashim J:

On 9 November 1987 Mr. Ranjah bin Tikoi @ John died. Mr. Tikoi (deceased) was a traffic controller, Jabatan Keretapi Sabah. Deceased left a pension of according to Jabatan Keretapi Sabah RM512.50 p.m., according to Public Services Department Malaysia (Sabah Branch) RM532.50 p.m. There are two claimants to the pension.

(1) Puan Lee Nyuk Wan @ Julia (plaintiff) who says she is the sole widow;

(2) Puan Chin Oi Jin (defendant) says she is the sole widow.

The Public Services Department Malaysia (Sabah Branch) has indicated that the issue of who is the sole widow or as in a case of a polygamous marriage the issue of who are the widows be resolved before the pension can be released to the rightful widow/s as the case may be.

Plaintiff's case

Plaintiff married deceased at the Roman Catholic Church of St. Francis Xavier, Keningau, the marriage solemnised in accordance with the Roman Catholic Church Marriage Rites, registered under No. 28/55 (LNW1) confirmed by the Rev. Father Joseph Samuel @ Thomas, now Resident Priest, The Roman Church of St. Francis Xavier, Keningau, on 19 August 1955. They have six children, ages not given.

Soon after deceased died plaintiff inquired as to the position of the pension and was shocked that deceased had purportedly divorced her, the purported divorce granted by the Native Court Tenom on 16 August 1965, Certificate of Divorce Mahkamah Anak Negeri Tenom No. 40/65 dated 14 December 1987 (LNW3).

That in fact and in law she is the sole widow, the only person entitled to the pension.

Defendants' Case

As in defendant's affidavit-in-oppostion affirmed on 23 August 1993:

> 7. I began living with the deceased as husband and wife in 1962. On 28 May 1963, I gave birth to our eldest daughter Jane bte Ranjah. Due to our ignorance, we did not cause a registration of her birth to be properly registered with the Registry of Birth. However, in May 1985, when my said eldest daughter applied for a passport, she caused a relevant surat akuan to be made and attested by the relevant people testifying to her particulars of birth. A copy of the Surat Akuan is now produced and shown to me marked "C3".

8. On 12 December 1964, I gave birth to my second daughter with the deceased. A copy of the extract of her birth certificate is now produced and shown to me marked "C4".

9. At all material times, the deceased and I were living in Membakut Railway Station quarters, Membakut.

10. On 10 March 1975, the deceased and I made the relevant "Pengakuan" before the Mahkamah Anak Negeri, Membakut, testifying to the fact that we had been cohabiting since 1962 as husband and wife according to Murut custom and had two children and requested for our marriage to be officially solemnised. The Mahkamah Anak Negeri Membakut accordingly solemnised our marriage and issued the relevant certificate of marriage. A copy of the said "Pengakuan" is now produced and shown to me marked "C5" and a copy of the said certificate is now produced and shown to me marked "C6".

11. In or about the month of October 1987, my late husband, the deceased was hospitalised at the Queen Elizabeth Hospital, Kota Kinabalu. I lived with him since 1962 as husband and wife and he did not have any relationship whatsoever with the plaintiff since leaving her. Even till he was hospitalised, I was the only one who looked after and cared for him. The plaintiff did not even know about his sickness until his death on 9 November 1987. The plaintiff never came to the hospital to visit the deceased while he was hospitalised nor did she attend the funeral service.

12. While being hospitalised, on the advice of my son-in-law, one Mr. Awang Ahmad, the Legal Officer and Secretary of Sabah Development Bank Berhad, I went to Mahkamah Anak, Negeri Tenom to have a copy of the divorce record between the deceased and his ex-wife, the plaintiff, to be properly documented and the relevant certificate issued. A copy of the said certificate of divorce was duly issued by the office of Mahkamah Anak Negeri Tenom on 4 December 1987. The original copy of the same was handed over to the Jabatan Keretapi Sabah and a certified true copy of the same by Mr. Ronny Cham was retained by me. The said certified true copy is now produced and shown to me marked "C7".

The Law

With respect, without having to quibble over s. 5, Christian Marriage Ordinance, Cap. 24, Laws of North Borneo 1953, repealed and replaced by the Law Reform (Marriage and Divorce) Act, 1976, on 1 March 1982, but relevant in the present case before me, without having to quibble over ss. 2 and 3, Divorce Ordinance No. 7 of 1963, repealed and replaced also by the Law Reform (Marriage and Divorce) Act, 1976, also on 1 March 1982, but also relevant in the present case before me, it is settled law as stated in *Kupok binte Limpangon v. Kondilong binte Lantayan* [1967], Cases on Native Customary Law In Sabah [1953-1972] at page 80, with the caption "Conflict of Law Native Custom and Christian law - Divorce ... Marriage according to Christian form - Divorce according to law,":

Held:

[1] That only the High Court could grant a divorce in the case of a Christian marriage ... These two people are not divorced because they were married in Christian form and they will have to go to the High Court if they want a divorce.

Conclusion

Thus,

(1) Plaintiff and deceased have never been divorced;

(2) Plaintiff's and deceased's marriage being a monogamous marriage in accordance with the Roman Catholic Church Marriage Rites and plaintiff and deceased never having been divorced nor the marriage dissolved defendant did not have the legal capacity to be a party to the purported "Pengakuan" ("C5") and the purported "Surat Keterangan Nikah" ("C6") Mahkamah Anak Negeri Membakut is null and void, is of no effect whatever;

(3) Indeed the Mahkamah Anak Negeri Tenom realised its mistake in purportedly granting the divorce between plaintiff and deceased, in purportedly issuing the Certificate of Divorce No. 40/65 dated 14 December 1987 (LNW3) and in chronological order on 28 March 1988 wrote to the Pengurus Besar, Jabatan Keretapi Sabah, "... Maka dengan ini saya ishtiharkan sijil tersebut tidak sah dan dibatalkan serta merta.", on 2 August 1993 wrote to Counsel for plaintiff in reply to Counsel for plaintiff's letter dated 10 August 1993, "02. Pejabat ini mengesahkan bahawa Sijil Perceraian bernombor 40/65 diantara Mendiang Ranjah Tikoi dengan Puan Lee Nyuk Lan (*sic*) adalah benar tidak sah dan dibatalkan".

Court Order

I therefore grant order-in-terms of plaintiff's application dated 11 October 1989.